

IN THE MATTER OF : BEFORE THE
MT. AIRY BIBLE CHURCH : HOWARD COUNTY
Petitioner : BOARD OF APPEALS
: HEARING EXAMINER
: BA Case No. 09-032C

.....

DECISION AND ORDER

On November 9, 2009, the undersigned, serving as the Howard County Board of Appeals Hearing Examiner, and in accordance with the Hearing Examiner Rules of Procedure, heard the petition of Mt. Airy Baptist Church to enlarge a previously approved private school conditional use by increasing the number of students from 280 to 480 in an RC-DEO (Rural Conservation: Density Exchange Option) Zoning District, pursuant to Section 131.N.46 of the Howard County Zoning Regulations (the "Zoning Regulations").

The Petitioner certified to compliance with the notice, advertising, and posting requirements of the Howard County Code. I viewed the subject property as required by the Hearing Examiner Rules of Procedure.

Thomas Meachum, Esquire, represented the Petitioner. Marvin Patrick and Mark Tislik testified on behalf of the Petitioner. Mark Stysley, Eugene Winters, Stephanie Fleming, Janet Johnson, Homer Johnson and Nora Riley testified in opposition to the petition.

FINDINGS OF FACT

Based upon the preponderance of evidence presented at the hearing, I find the following facts:

1. The subject property is located in the 4th Election District on the northwest corner of the Old Frederick Road intersection with Watersville Road. The Property is referenced on Tax Map 7, Grid 3, as Parcel 172 and is also known as 16700 Old Frederick Road.

2. The 14.23-acre, irregularly shaped Property has about 1,108 frontage feet on Old Frederick Road and about 754 on Watersville Road. The Property's west lot line is about 385 feet deep, the rear, about 886 feet long. The Property slopes down about 50 feet from the Old Frederick Road frontage to the northwest corner. A stream runs along the northern, rear portion.

3. The Property is improved with a brick church building (the "main building") fronted by a porte-cochere situated in its middle section and about 108 feet from Old Frederick Road. Attached to the rear (the northern façade) of the main building and siting at a lower elevation is a 14,970-square-foot metal-sided school. To the main building's west is a three-story masonry private school addition. This addition was approved in BA Case NO. 03-068C&V.

4. The original entrance driveway (Entrance 1, as depicted on Petitioner's Exhibit A) lies to the church's southeast and merges with a northwardly sloping parking lot to the church's east. To the east of this parking lot are a playground and a sports field

area. The Entrance 1 driveway forks west past the side parking lot and its drive aisle runs through the port-cochere and a long parking lot paralleling Old Frederick Road, then becomes an exit driveway. Just past the western parking lot, opposite the exit, the driveway forks to the north and runs deep into the Property, leading to a bus parking area, a large aboveground propane tank, and a service/trash area near the masonry addition. A one-story, single-family detached dwelling (the Parsonage) is sited in the Property's Southwest area. To the dwelling's south are several metal shipping containers and to its north, two sheds adjacent to the west lot line.

5. Vicinal Properties. Adjacent properties are also zoned RC-DEO. Abutting much of the Property's northern lot line, Lot 1 of Parcel 128 is improved by a single-family detached dwelling and multiple greenhouses. Lot 2 to the west of Lot 1 is improved with a dwelling fronting on Watersville Road. The wooded rear of this property abuts the Property. Parcel 60 lies between Lots 1 and 2 and fronts on Watersville Road. These properties sit at a higher elevation than the Property, making them highly visible from the Property. Across Waterville Road to the east is Parcel 75, a farm. Across Old Frederick Road to the south is I-70. To the Property's west, Parcels 4 and 28 are each improved with a single-family detached dwelling fronting on Old Frederick Road.

6. Roads. Old Frederick Road has two travel lanes and wide paved shoulders within about 42 feet of paving in a variable width right-of-way. The standard posted speed limit is 50 MPH, and 25 MPH along the Property owing to the school. The sight distance at the western exit on Frederick Road is more than 1,000 feet east to the

intersection and more to the west. This exit was approved when the most recent Site Development Plan was approved as meeting all requirements. The Petitioner does not propose to alter this exit or Entrance No. 1 in any manner. There is no ingress/egress from Watersville Road. According to Department of Public Works data, the traffic volume on Old Frederick Road east of the Carroll County Line was 3,390 average daily trips as of January 2007.

7. The General Plan. Policies Map 2000-2020 of the 2000 General Plan designates the Property as a "Rural Conservation Area" land use. Transportation Map 2000-2020 of the 2000 General Plan depicts Old Frederick Road as a Major Collector.

8. Zoning History.

BA 79-19E. On June 4, 1970, the Board of Appeals granted the Church of the Open Bible a Special Exception for a Religious Facility and Private School.

BA 90-18E. On September 4, 1990, the Board of Appeals granted Lisbon Bible Church a Special Exception to enlarge an existing church and school facility subject to six conditions, including a 100-maximum student enrollment, developing the Property in strict accordance with an approved site plan, planting evergreen and deciduous trees in certain areas in accordance with a landscaping plan, and complying with all Howard County Bureau of Environmental Health septic requirements.

BA 98-22E. On June 16, 1998, the Board of Appeals granted Lisbon Bible Church's petition to enlarge an existing church and private school facility by adding three temporary classroom trailers, subject to six conditions, including requiring all new

outdoor lighting to comply with Section 134 of the Zoning Regulations, a 175-maximum student enrollment, developing the Property in strict accordance with an approved site plan, planting the evergreen trees required as a condition of approval in BA 90-18E, and complying with all Howard County Bureau of Environmental Health septic requirements.

BA 99-28E. On November 23, 1999, the Board of Appeals granted Mt. Airy Bible Church a Special Exception to enlarge an existing church and private school facility and for two temporary classrooms, subject to seven conditions, including requiring any new outdoor lighting to comply with Section 134 of the Zoning Regulations, limiting student enrollment to 275 students, obtaining a modification of the conditions of approval to reflect this increase, landscaping the edges of the development in accordance with Section 16.124 of the Subdivision and Land Development Regulations, and removing the parking lot and parking lot lighting within the required 50-foot use setback from the Old Frederick Road right-of-way.

BA 00-42E. On February 27, 2001, the Board of Appeals granted Mount Airy Bible Church's petition to modify Condition No. 1 of BA 99-28E by relocating two portable classrooms, subject to three conditions, including Condition No. 2, which requires all other conditions of approval in BA 99-28E to remain in full force and effect.

BA 03-068C&V. On May 17, 2004, February 27, 2001, the Board of Appeals Hearing Examiner granted Mount Airy Bible Church's petition to enlarge an existing religious facility and private school, and variances to reduce the 50-foot use setback from a public street right-of-way to 25 feet for a soccer field and to 24 feet for a parking lot.

Finding No. 4 states, "[l]ighting in the parking area will be provided by 16-foot poles that will direct light away from the neighboring residential properties." The Hearing Examiner approved the petition subject to the condition that the Petitioner obtains building permits for Phase II of the development by December 31, 2007, and substantially completes Phase II by December 31, 2008. According to the Technical Staff Report ("TSR"), in Phase II the Petitioner was to have enlarged the sanctuary to the west of the masonry addition. (Apparently the proposed lower level addition depicted on Petitioner's Exhibit A.) The approval for this addition has expired and the petition states it will not be constructed.

9. The Proposal. The Petitioner is proposing to enlarge the previously approved private school conditional use by increasing the total number of students to 480. No new construction is proposed. To support the increase in students, the Petitioner would be expanding septic capacity. The Conditional Use Plan, General Note 11, states that 169 spaces are required for the religious facility, which is the more intensive use, and that 241 spaces are currently provided.

10. Water and Sewer Service. The Property is served by private water and sewer facilities. There are three existing wells on the Property: one to the east of the driveway entrance, one south of the brick church, and one to the dwelling's southwest. The exiting septic area lies under the original parking lot to the east of the main building (the church).

The record includes an October 28, 2009 memorandum from Sara Sappington, a registered sanitarian with the Health Department's Well and Septic Program, to Bob Lalush, Acting Chief of the Department of Planning and Zoning's ("DPZ") Division of

Planning and Zoning Administration.¹ The memorandum informs Mr. Lalush of a complaint alleging 400 students currently attend the school, but that the on-site sewage disposal system was designed for 333 students.² The memorandum also states the Health Department does not object to the expansion, having approved a percolation certification plan certifying the proposed septic area for the proposed 480 total student population. The memo further notes the church's application to the Maryland Department of the Environment has not yet issued a discharge permit to accommodate the 480-student population, and that the proposed increase in student capacity is subject to further review.

Mark Tislik, a civil engineer testified to preparing the Conditional Use Plan. He stated that the only change would be new septic areas, which are depicted on the plan. In response to questioning about the capacity of the current septic system, which was designed for 333 students, Mr. Tislik stated that there is no septic problem. Over the last several months, the church has monitored its water use. The data indicates that each student uses only 4 gallons per day, not the permissible 15 gallons per day per student. In his opinion, the discharge determines the health of the septic system, not the number of students. However, the new septic areas will comply with the 15-gallon standard.

Marvin Patrick testified that 408 students currently attend the school, and that there are no problems with the current septic system.

11. Outdoor Lighting. The TSR states the Property is the subject of a

¹ The memo updates an October 8, 2009 memorandum attached to the TSR informing Mr. Lalush that the department does not object to the expansion and the pending approval of the discharge permit.

longstanding zoning violation case, ZC-07-025, "Failure to develop the property type of lighting on the premises in accordance with Conditional use Decision BA 03-068C&V and approved SDP-04-150; specifically improper height, location, and shielding of lights for some expanded parking lot lights and recommends the zoning violation issue be resolved before the increase in students begins. Included in the record is a copy of a November 3, 2009 Notice of Violation concerning two violations, failure to develop proper lighting in accordance with conditional use decision BA 03-68C&V and SDP-04-150, and light trespass onto neighboring properties, which are violations of Sections 130.B.2.c and 134.D.1 of the Zoning Regulations and Section 16.106(a) of the Subdivision and Land Development Regulations, respectively. Marvin Patrick testified that the outdoor lighting complies with Zoning Regulations and that lights are off at 9:00 p.m.

Stephanie Fleming testified that the light shining into her home at night is like daytime lighting, that she does not need a flashlight to walk around in her yard at night and that the lights do not go off at 9:00 p.m. as required.

12. Eugene Winters testified to a current traffic problem because parents, not buses, drop off and pick up students.

13. Nora Riley testified to the presence of three shipping containers in the parsonage front yard. They were to have been landscaped, but to this date have not. The church dumps waste in the side setback.

² The memo cites Code of Maryland Regulations Section 26.04.02.02(F), which states "A person may only dispose of sewage, body, or industrial waste in accordance with an approved on-site sewerage disposal

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, I conclude as follows:

I. General Criteria for Conditional Uses (Section 131.B)

A. Harmony with the General Plan. Section 131.B.1 requires me to evaluate whether the proposed enlargement of an approved conditional use plan will be in harmony with the land uses and policies indicated in the Howard County General Plan for the district based on in which it is located. In making this evaluation, I am required to consider:

- a. The nature and intensity of the use, the size of the site in relation to the use, and the location of the site with respect to streets giving access to the site; and**
- b. If a conditional use is combined with other conditional uses or permitted uses on a site, whether the overall intensity and scale of uses on the site is appropriate given the adequacy of proposed buffers and setbacks.**

General Plan Policies. The General Plan designates the area as Rural Conservation. The established presence of the religious facility and private school in the community is part of the area's rural character.

The Nature and Intensity of the Use. In this case, no new construction is proposed. The intensity of the use is discussed in Part II below.

The size of the site in relation to the use. The proposed area of the 14.23-acre Property for the private school is unchanged and the Conditional Use Plan depicts

permit or other method of disposal approved by the Approving Authority."

additional septic system areas. The Site continues to be an appropriate size in relation to the use.

The location of the site with respect to streets giving access to the site. The Site will continue to be accessed from the existing entrance and exit, and the sight distance will continue to be adequate for the use.

The appropriateness of the conditional use in combination with a permitted use on the site. The proposed enlargement of the private school through an increase in student population will be combined with two existing permitted uses, the religious facility and the parsonages. Given that all uses meet or exceed the proposed or existing buffers, the enlargement is appropriate.

B. Adverse Effect

Unlike Section 131.B.1, which concerns the proposed use's harmony or compatibility with the General Plan, compatibility with the neighborhood is measured under Section 131.B.2's four "adverse effect" criteria: (a) physical conditions; (b) structures and landscaping; (c) parking areas and loading, and; (d) access.

When assessing a proposed conditional use under these criteria, we must first recognize that virtually every human activity has the potential for adverse impact. Zoning recognizes this fact and, when concerned with conditional uses, accepts some level of such impact in light of the beneficial purposes the zoning body has determined to be inherent in the use. Thus, the question in the matter before me is not whether the proposed use would have adverse effects in a B-2 District. The proper question is whether

there are facts and circumstances showing that the particular use proposed at the particular location would have any adverse effects above and beyond those inherently associated with such a special exception (conditional) use irrespective of its location within the zone. *People's Counsel for Baltimore County v. Loyola College in Maryland*, 406 Md. 54, 956 A.2d 166 (2008); *Schultz v. Pritts*, 291 Md. 1, 432 A.2d 1319 (1981); *Mossburg v. Montgomery County*, 107 Md. App. 1, 666 A.2d 1253 (1995).

For the reasons stated below, I conclude the Petitioner has met its burden under Section 131.B.2 of the Zoning Regulations to establish this proposed use will not have adverse effects on vicinal properties beyond those ordinarily associated with an increase in the student population of an existing private school affiliated with a religious facility.

a. Physical Conditions. Whether the impact of adverse effects such as noise, dust, fumes, odors, lighting, vibrations, hazards or other physical conditions will be greater at the subject site than it would generally be elsewhere in the zone or applicable other zones.

There is no evidence the increase in the student population would generate inordinate noise or other physical effects detectable from adjacent properties. Although additional students may increase the noise levels in the outdoor playing fields, there is no evidence the noise levels at this site would be greater than at a school of similar size. The outdoor lighting violation is addressed below. With the exception of the outdoor parking lighting, which is addressed in Part III, I conclude that any inherent operational adverse effects resulting from the proposed conditional use will not be greater at the subject site than elsewhere in the zone or applicable other zones, in accordance with Section 131.B.2.a.

b. Structures and Landscaping. The location, nature and height of structures, walls and fences, and the nature and extent of the landscaping on the site are such that the use will not hinder or discourage the development and use of adjacent land and structures more at the subject site than it would generally in the zone or applicable other zones.

All existing structures exceed the minimum structure setback requirements and comply with height requirements, as was found in BA 03-068C&V and prior Decisions and Orders. The nature and extent of the existing landscaping on the site are such that the enlargement will not hinder or discourage the development and use of adjacent land and structures more at the subject site than it would generally in the zone or applicable other zones, in accordance with Section 131.B.2.a.

c. Parking and Loading. Parking areas will be of adequate size for the particular use. Parking areas, loading areas, driveways and refuse areas will be properly located and screened from public roads and residential uses to minimize adverse impacts on adjacent properties.

The Zoning Regulations require 80 parking spaces for 480 students and there are currently 241 spaces. This amount meets or exceeds the required number of spaces. As noted above, Conditional Use Plan General Note 11 states that 169 spaces are required for the religious facility, which is the more intensive use. Consequently, parking is adequate even if all uses operate at the same time. Additionally, in BA 03-068C&V, the Board of Appeals concluded the driveways and parking areas were properly located and screened from public roads and residential uses to minimize adverse impacts on adjacent properties. I therefore conclude the enlargement accords with Section 131.B.2.c.

d. Access. The ingress and egress drives will provide safe access with adequate sight distance, based on actual conditions, and with

adequate acceleration and deceleration lanes where appropriate.

The existing driveway appears to provide continued safe access, with adequate sight distance, in accordance with Section 131.B.2.d.

II. Specific Criteria for Structures Used Primarily for Schools, Colleges, Universities – Private Academic (Section 131.N.46)

a. The maximum density permitted is 60 pupils per acre for lots less than three acres, and 100 pupils per acre for lots three acres or greater.

The proposed number of students at the private academic school on the 14.23-acre Site is 480 and this section permits 1,400. The amendment accords with Section 131.n.46.a.

b. In addition to meeting the area requirements of Section 131.N.54.a, schools with residence accommodations shall provide an additional 500 square feet of lot area per site resident. Residents shall include students, staff members, caretakers and their families who reside on the site.

This section is inapplicable as no residential accommodations are proposed.

c. A private school may be erected to a greater height than permitted in the respective district, provided that no structure is more than three stories in height and the front, side and rear setbacks shall be increased two feet for each foot by which such structure exceeds the height limitation.

Because no new construction is proposed, this section does not apply.

d. Sufficient off-street school bus loading areas shall be provided if bus service is provided for students.

No bus service was proposed in BA 03-0668C&V, nor does the proposed enlargement petition propose bus service. As no bus service is proposed, this section is inapplicable.

e. Outdoor uses will be located and designed to shield residential property from noise or nuisance. Play areas, athletic fields and similar uses shall be buffered from residential properties by fencing, landscaping, adequate distance or other appropriate means.

All outdoor use areas were approved in previous petitions. The primary outdoor uses are generally located in the eastern portion of the property, and are well screened and buffered from the surrounding area. The petition complies with Section 31.n.46.e.

f. Buildings, parking areas and outdoor activity areas will be at least 50 feet from adjoining residentially zoned properties other than a public road right-of-way. The Hearing Authority may reduce this setback to no less than 20 feet or the minimum setback required by the zoning district, whichever is greater if:

- (1) The adjoining land is committed to a long term institutional or open space use that provides an equivalent or better buffer for vicinal residential development; or**
- (2) The petition includes detailed plans for screening, consisting of a combination of a solid fence or wall and landscaping, or an equivalent combination, that presents an attractive and effective buffer for neighboring properties.**

The petition does not propose any new building, parking areas, or outdoor activity areas. Section 131.n.46.f is therefore inapplicable.

g. At least 20 percent of the area within the building envelope will be green space, not used for buildings, parking area or driveways. The building envelope is formed by the required structure setbacks from property lines and public street rights-of-way.

The Hearing Authority previously determined the existing development complied with Section 131.N.46.g. According to the Conditional Use Plan, about 69.6 percent of

the Site is green space. No new buildings, parking areas, or driveways are proposed. The petition accords with Section 131.n.46.g.

h. The site has frontage on and direct access to a collector or arterial road designated in the General Plan, except that expansions of a conditional use that was approved prior to the effective date of Council Bill No. 11-2001 are permitted.

The Property fronts on and has direct access to Old Frederick Road, a Major Collector highway, in compliance with Section 131.n.46.h.

IV. Outdoor Lighting

The Board of Appeals granted the Petitioner's conditional use petition in BA 03-68V&V subject in pertinent part to the condition that new outdoor light comply with Section 134 of the Zoning Regulations. Although Mr. Marvin Patrick testified the outdoor lighting complies with Zoning Regulations and that lights are off at 9:00 p.m., this testimony is unpersuasive. The evidence and testimony in this case instead convinces me that the Petitioner has not complied with this condition or relevant findings. The TSR states the Property is the subject of a longstanding zoning violation case, ZC-07-025, "Failure to develop the property type of lighting on the premises in accordance with approved SDP-04-150; specifically improper height, location, and shielding of lights" for some expanded parking lot lights and recommends that the zoning violation issue be resolved before the increase in students begins. Included in the record is a copy of a November 3, 2009 Notice of Violation concerning a notice of violation relating in pertinent part to the Petitioner's failure to develop proper lighting in accordance with BA

03-68C&V. Additionally, Stephanie Fleming testified that the light shining into her home at night is like daytime lighting.

Maryland courts instruct us that it is an improper exercise of the Hearing Authority's function to transform zoning application proceedings into a violation and enforcement process. For this reason, I may not deny the requested conditional use in this case because the applicant has allegedly committed violations of the conditions of a previous permit. *Klein v. Colonial Pipeline Co.*, 55 Md. App. 324, 337, 462 A.2d 546, 554, 1983 (internal citations omitted).³

This instruction notwithstanding, Section 131.H.1 of the Zoning Regulations permits me to attach conditions to the proposed use or plan as deemed necessary to ensure continuous conformance with all applicable standards and requirements, including findings or conditions imposed in previous conditional use decisions and orders approved on the Site.

To ensure the Petitioner complies with the outdoor lighting conditions imposed as a condition of approval in BA 03-68C&V and prior Decisions and Orders, as a condition of approval I am prohibiting the enlargement of the use from commencing by limiting the student enrollment to the 408 students currently attending the school until the Petitioner demonstrates compliance all outdoor parking light requirements imposed by the Hearing Authority to DPZ.

IV. Opposition Testimony

Once a petitioner presents sufficient evidence establishing its proposed use meets the requirements of the statute, it is incumbent upon those opposed to the petition to show the use at the proposed location would cause an adverse effect upon adjoining and surrounding properties unique and different, in kind or degree, than that inherently associated with such a use regardless of its location within the zone. *Mossburg v. Montgomery County*, 107 Md. App. 1, 666 A.2d 1253 (1995).

The persons who testified in opposition to the proposed enlargement to an approved conditional use have not met their burden of showing the proposed use would have an atypical burden upon adjoining and surrounding properties. The speculative nature of their testimony about future water and septic problems and traffic does not sufficiently demonstrate any adverse effects unique or different from those ordinarily associated with a private school in an RC-DEO zoning district. The County Council has already determined that private schools are presumptively compatible with RC-DEO-zoned communities. In this case, there is insufficient credible evidence in the record to defeat this presumption.

As to the Opposition's testimony about the septic system's safety, Maryland courts instruct us that the unsupported conclusions or fears of witnesses about a proposed use of the property resulting in harm are nothing more than vague and general expressions of opinion, which are lacking in probative value. *Anderson v. Sawyer*, 23 Md. App. 612, 329 A.2d 716 (1974). Because the Opposition's testimony in this case was unsupported by any

³ Section 102.B permits persons aggrieved by an alleged violation of the Zoning Regulations to request the Department of Planning and Zoning to issue a zoning violation notice. In addition, Section 131.L of the

evidence that the anticipated harmful effects are likely to occur, I must afford it no weight. Equally important is the fact that I am not permitted to make a specific evaluation as to the environmental or public health impact of the septic system. This is the province of the Health Department and the Maryland Department of the Environment. Where the County or State occupies a field of regulation, it is not within my authority to preclude their judgment.

Concerning the opposition's testimony about the traffic affiliated with the use, I conclude it has not met its burden of demonstrating it is atypical of an assembly use in the RC zone.⁴

Zoning Regulations permits the Department to initiate action to revoke a conditional use.

⁴ I note that while traveling to and from my site visit to the Property on a Wednesday afternoon, I passed several schools in western Howard County with a marked increase in traffic and a line of cars awaiting entrance to the school sites.

ORDER

Based upon the foregoing, it is this 23th day November 2009, by the Howard County Board of Appeals Hearing Examiner, **ORDERED:**

That the request of Mt. Airy Bible Church to enlarge an approved private school conditional use by increasing the number of students from 280 to 480 students in an RC-DEO Zoning District is hereby **GRANTED**;

Provided, however, that:

1. The enlarged conditional use shall be conducted in conformance with and shall apply only to the increase in the number of students attending the private school described in the petition and depicted on the Conditional Use Plan, and not to any other activities, uses, or structures on the Property.
2. Lighting in the parking area will be provided by 16-foot poles that will direct light away from the neighboring residential properties.
3. The enlarged conditional use shall not commence and there shall be no increase in the student population beyond the 408 students currently enrolled at the school until the Petitioner demonstrates compliance with all outdoor parking light requirements or conditions to DPZ.
5. The Petitioner shall comply with all applicable federal, state, and county laws and regulations.
6. The Petitioner shall comply with all agency comments.

HOWARD COUNTY BOARD OF
APPEALS
HEARING EXAMINER



Michele L. LeFaivre

Date Mailed: _____

Notice: A person aggrieved by this decision may appeal it to the Howard County Board of Appeals within 30 days of the issuance of the decision. An appeal must be submitted to the Department of Planning and Zoning on a form provided by the Department. At the time the appeal petition is filed, the person filing the appeal must pay the appeal fees in accordance with the current schedule of fees. The appeal will be heard *de novo* by the Board. The person filing the appeal will bear the expense of providing notice and advertising the hearing.